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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b),)

FM Table of Allotments,)

FM Broadcast Stations.)

(Caro and Cass City, Michigan))

MAILED
SEP 30 2008
MM Docket No. 01-33 FCC main room
RM-10060

MEMORANDUM OPINION AND ORDER**Adopted: September 24, 2008****Released: September 26, 2008**

By the Commission:

1. The Commission has before it an Application for Review of the *Memorandum Opinion and Order*¹ in this proceeding, filed by Edward Czelada ("Czelada"). For the reasons set forth below, we deny the Application for Review.

I. BACKGROUND

2. At the request of Edwards Communications, LC ("Edwards"), licensee of Station WIDL, Channel 221A, Caro, Michigan, the *Notice of Proposed Rule Making* ("Notice")² in this proceeding proposed the substitution of Channel 221C3 for Channel 221A at Caro, Michigan, reallocation of Channel 221C3 from Caro to Cass City, Michigan, and the modification of the Station WIDL license to specify operation on Channel 221C3 at Cass City. In response to the *Notice*, Czelada filed a timely counterproposal (the "Counterproposal") requesting the allotment of Channel 218C3 to Ubly, Michigan. Czelada also proposed alternate Channel 297C3 at Cass City. The Bureau granted Edwards' proposal and dismissed the Counterproposal as defective³ because the Commission's rules (the "Rules") do not permit rulemaking proponents to specify noncommercial educational ("NCE") reserved band channels, such as Czelada's Channel 218C3 proposal at Ubly, in allotment proceedings.⁴ The Bureau explained that NCE new station licensing is an application-based procedure that is fundamentally different from the procedures used to add or modify non-reserved band allotments listed in the FM Table of Allotments.⁵

¹ See *Caro and Cass City, Michigan*, Memorandum Opinion and Order, 19 FCC Rcd 4352 (MB 2004) (the "Reconsideration Order").

² See *Caro and Cass City, Michigan*, Notice of Proposed Rule Making, 16 FCC Rcd 2908 (MB 2001).

³ See *Caro and Cass City, Michigan*, Report and Order, 16 FCC Rcd 9461 (MB 2001) ("Report and Order"), and *Caro and Cass City, Michigan*, Erratum (MB May 11, 2001) (unpublished) ("Erratum"). A footnote dismissing the counterproposal was inadvertently omitted in the *Report and Order*, but this oversight was corrected in the *Erratum*.

⁴ See 47 C.F.R. § 1.401(d); see also 47 C.F.R. §§ 73.202, 73.501.

⁵ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), vacated in part on other grounds sub nom., *National Public Radio v. FCC*, 254 F.3d 226 (D. C. Cir. 2001) clarified, Memorandum Opinion and Order, 16 FCC Rcd 5047, *Erratum*, 16 FCC Rcd (continued....)

Furthermore, the Bureau found Czelada failed to include any engineering showing to support his proposal, and that the proposal was technically unacceptable because of conflicts with two pending co-channel applications.⁶

3. In the Application for Review, Czelada concludes that his counterproposal was not, in fact, considered fairly in the *Report and Order* or on reconsideration.⁷ He repeats his request that the Commission allot Channel 218C3 at Ubly, Michigan, under Section 307(b) of the Communications Act of 1934, as amended. Czelada also argues that the Bureau did not consider the preclusionary effects on potential NCE service of a Channel 221C3 allotment at Cass City.

II. DISCUSSION

4. We deny the Application for Review. We conclude that the typographical errors in the staff orders do not constitute reversible error.⁸ We further conclude that the Counterproposal was technically unacceptable and properly dismissed on this basis. A counterproposal must be technically correct and substantially complete at the time it is filed.⁹ In this instance, the Channel 218C3 proposal at Ubly, Michigan, was in conflict with two pending and prior filed NCE applications on Channel 218A at Bridgeport and Fremont, Michigan.¹⁰ In addition, FM allotment rulemaking procedures are limited to non-reserved band channels.¹¹ Accordingly, the Counterproposal, which specifies a reserved band channel, is subject to dismissal on this basis alone.¹² Moreover, the alternate Channel 297C3 allotment proposed by Czelada for Cass City failed to meet the minimum distance separation requirements set forth in Section 73.207(b) of the Rules or the principal city coverage requirement of Section 73.315(a) of the Rules.¹³

(Continued from previous page)

10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002), *aff'd sub nom. American Family Ass'n v. FCC*, 365 F.3d 1156 (D.C. Cir 2004), *cert. denied*, 125 S.Ct. 634 (2004).

⁶ See File Nos. BNPED-20000214ABC and BPNE-20000307AAA.

⁷ He also cites to typographical errors in the *Reconsideration Order* as support for his contention that his proposal was not adequately considered. See *Application for Review* at 3.

⁸ The *Report and Order* used incorrect coordinates for Cass City which were corrected in the *Reconsideration Order*. The *Reconsideration Order* transposed the parties' names twice in the background section and once in the discussion.

⁹ See *Caldwell, College Station and Gause, Texas*, Memorandum Opinion and Order, 15 FCC Rcd 20641 (2000); see also, *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, Memorandum Opinion and Order, 12 FCC Rcd 2254 (MB 2006); *Fort Bragg, California*, Report and Order, 6 FCC Rcd 5817 (MMB 1991); and *Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas*, Report and Order, 3 FCC Rcd 6507, 6511 n.2 (MMB 1988).

¹⁰ See File Nos. BNPED-20000214ABC and BPNE-20000307AAA.

¹¹ See 47 C.F.R. §1.420(a) (establishing procedures for the "FM Table of Allotments") and 47 C.F.R. §73.202(a) (limiting the FM Table of Allotments to non-reserved channels 221-300).

¹² See 47 C.F.R. § 1.401(e).

¹³ In addition to the identified technical defects, Czelada did not verify his counterproposal as required by Section 1.52 of the rules. He also failed to include an engineering study or make the requisite commitment to apply for and construct the proposed NCE facility.

5. Finally, we find without merit Czelada's argument that the staff failed to consider the preclusionary effect of the Channel 221 upgrade at Cass City on existing and potential NCE FM service.¹⁴ Czelada did not raise this issue prior to the issuance of the *Report and Order* or the *Reconsideration Order*. Accordingly, the Rules bar Czelada from raising this issue on review.¹⁵ Even if we were to consider the argument, we would deny review. Note 1 to Section 1.420(h) of the Rules imposes a "particularly heavy burden" on Channel 221 upgrade proponents by requiring the Commission to consider the preclusive impact of the upgrade on NCE FM service. The Commission, however, undertakes this analysis only when the 60 dBu contour of the Channel 221 upgrade proposal overlaps the Grade B contour of a television channel 6 station.¹⁶ No such overlap would occur in this case. Therefore, this argument is without merit.

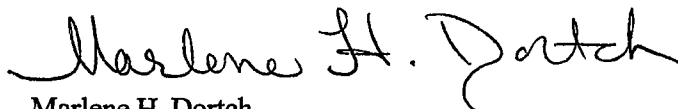
6. Accordingly, for the reasons discussed herein, we affirm the Bureau's action dismissing Czelada's Counterproposal. In addition, we affirm the Bureau's action substituting Channel 221C3 for Channel 221A at Caro, Michigan, reallocating Channel 221C3 from Caro to Cass City, Michigan, and modifying Station WIDL's license to specify operation on Channel 221C3 at Cass City.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, That the Application for Review filed by Edward Czelada IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

¹⁴ See 47 C.F.R. §1.420(h) Note 1.

¹⁵ See 47 C.F.R. §1.115(c). See also *Bear Lake and Honor, Michigan*, Memorandum Opinion and Order, 14 FCC Rcd 8799 (1999).

¹⁶ See *FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*, First Report and Order, 2 FCC Rcd 660, 661 (Order adopting Note 1 to Section 1.420).